

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :: 16-12-2006

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THE HONOURABLE MR.JUSTICE M.E.N.PATRUDU

WRIT PETITION Nos.24 & 52 OF 1995 AND 2324 & 2325 OF 1997

W.P.No.24 & 52 OF 1995 :

Balaji Distilleries Ltd.,  
rep.by its Executive Vice President  
(Distilleries & Breweries)  
R.Raghuram,  
having its corporate office at  
9, Basullah Road,  
Madras □ 17. ... Petitioner

-vs-

1. The Government of Tamil Nadu,  
represented by its Secretary,  
Home, Prohibition & Excise Department,  
Fort.St.George,  
Madras □ 9.

2. The Commissioner of Prohibition and Excise,  
Chepauk,  
Madras-5.

3. The Excise Supervisory Officer,  
Balaji Distilleries Ltd.,  
Bye-pass Road,  
Poonamallee,  
Madras -56. ... Respondents

W.P.Nos.2324 & 2325 OF 1997 :

EMPEE Distilleries Limited,

represented by its Managing Director  
Mr.M.P.Purushothaman  
and having its Corporate Office  
at No.695, Anna Salai,  
Madras - 600 006. ... Petitioner

-vs-

1. Government of Tamil Nadu,  
represented by its Secretary,  
Prohibition and Excise Department,  
Fort St.George,  
Madras-600 009.

2. The Special Commissioner &  
Commissioner of Prohibition & Excise,  
Chepauk,  
Madras - 600 005.

3. The Excise Supervisory Officer,  
EMPEE Distilleries Limited,  
Mevaloorkuppam,  
Sriperumbudur Taluk,  
Anna District. ... Respondents

Petitions under Articles 226 of the Constitution of India, praying for issuance of a writ of certiorari.

For petitioners : Mr.M.Ravindran,  
Sr.Advocate,  
for M/s.Manoharan, P.Ponnuswamy &  
S.Divagar.

For respondents : Mr.R.Viduthalai,  
assisted by Mrs.C.K.Vishnu Priya,  
Govt.Advocate.

#### COMMON ORDER

The prayer in W.P.Nos.24 of 1995 and 2325 of 1997 is to declare G.O.Ms.No.762/Home, Prohibition & Excise (III) Department, dated 29.06.1990, as unconstitutional and void.

2. The prayer in W.P.No.52 of 1995 is to quash the orders of the third respondent in R.C.No.237/94/A1, dated 17.11.1994.

3. The prayer in W.P.No.2324 of 1997 is to quash the orders of the third respondent in R.C.No.3/96 A, dated 27.12.1996,

4. The facts necessary for disposal of the writs are as follows :

4.1. The petitioner Balaji Distilleries Limited has installed its re-distillation unit at their factory for purification of rectified spirit and impure spirit to produce extra neutral alcohol for use in its Indian Made Foreign Spirit (IMFS) products.

4.2. The rectified spirit is allotted by the Commissioner of Prohibition and Excise on monthly basis to the petitioner company and in the allotment order, the name of the distillery from which the petitioner has to buy the rectified spirit will be mentioned and from the distillery the rectified spirit is brought by tanker lorries and are stored in the vats in the distilleries of the petitioner company which is located at the bye-pass road, Poonamalee.

4.3. The rectified spirit stored in the vats is kept under lock and key by the Excise Supervisory Officer, who releases the required quantity of rectified spirit every day after making an entry in the register maintained for this purpose.

4.4. On behalf of petitioner, it is further stated that on receiving the rectified spirit, the same is taken to the top overhead tanks and from the overhead tanks, the rectified spirit is drawn into the purification column where it is diluted with water and heated with steam at the temperature of 85 degree centegrade to 87 degree centegrade and in this process, the alchohol vapour will emanate which is condensed in the condensers provided for this and after separation of about 15% of this condensate, the rest is refluxed back into the purification column because it will contain the impurities such as acetic acid, aldehydes etc.

4.5. It is further stated that after separation of this low boiling impurities, the balance quantity is taken to rectifying column and there again it will be heated to boiling point i.e., 105 degree centegrade and the vapour arising out of this is condensed in condensers. In the last condenser and at the bottom of the rectifying column, separation of high boiling vapour like fusel oil is separated to the extent of 10% and about 75% of the rectified spirit is collected as pure ENA.

4.6. It is also stated that spent lees from the rectifying column will flow down to an exhaust column and let out at a temperature of 105 degree centegrade so that it will not carry any alcohol as boiling point of alcohol is only 78 degree centegrade to 80 degree centegrade.

4.7. Further, the impure spirit obtained out of rectifying spirit distillation contains recoverable amount of alcohol which can be used in IMFS production. Hence, to recover alcohol, the same process of re-distillation is carried out to extract maximum amount of alcohol. The alcohol available in the rectified spirit is extracted by the repeated distillation so that the allotment of rectified spirit made to the petitioner company is utilised to the maximum possible extent to maintain high productivity.

4.8. The petitioner further states that during the distillation process, losses are unavoidable under both the processes namely distillation of rectified spirit and re-distillation of impure spirit. Fluctuations of steam pressure, power failure, water shortage and mechanical failure in the machineries are some of the factors which contribute to the losses. The distillation is a continuous process and therefore the assessment of daily output compared to inputs cannot be made accurately unless purification columns and rectifying columns are completely exhausted and re-started. It is specifically stated that if daily assessment of output has to be made accurately, the distillation process has to be completed by exhausting the above mentioned columns everyday and then restarting the same everyday. If this process is carried out daily, it will affect the production of ENA to an extent of 15% to 20% and in addition, it will affect the quality of ENA.

4.9. Issue of licence for distilleries, allotment of rectified spirit, supervision and inspection at the factory, manufacture process etc. are governed by the Tamil Nadu Indian Made Foreign Spirits (Manufacture) Rules 1981, known as IFMS Rules, framed under the Tamil Nadu Prohibition Act, hereinafter called the 'Act'.

4.10. The case of the petitioner is that when IMFS Rules were introduced in the year 1981, it did not mention anything about the loss in the manufacturing process, but it contains provisions stating that no allowances for any loss in transit from the distillery to the blending unit shall be allowed. Thus, G.O.Ms.No.642/Prohibition and Excise (III) Department, dated 29.05.1986, was issued and rules were amended and under Rule 15 A (3), an allowance of 2% was allowed for loss in the process of purification or standardisation of spirit by distillation. It did not make any distinction between the distillation of rectified spirit or re-distillation of impure spirit.

4.11. While so, through the impugned G.O.Ms.No.762/Home, Prohibition and Excise (III) Department, dated 29.06.1990, the rules were again amended and for Rule 15 A (3), a new sub-rule has been substituted and under it, an allowance of not more than 3% per batch shall be allowed for loss in the entire process of distillation of rectified spirit, re-distillation of impure spirit and handling loss and if the loss in the entire process exceeds the allowance of 3%, the Commissioner shall levy a penalty of Rs.16% per proof litre on such excess loss and no allowance shall be given for further loss in the re-process of purification of impure spirit by re-distillation or mixing it with the next batch of rectified spirit. The G.O.says that the above amendment shall be deemed to have come into force on 1st February,1988. Thus, the government orders are issued with retrospective effect.

4.12. The second respondent addressed a letter to the third respondent on the basis of the above G.O. On 26.09.1994, directing him to collect a sum of Rs.17.96 lakhs from the petitioner on the excess loss of rectified spirit occurred in the process of purification during the period from February 1988 to November, 1989, except March 1989. The third respondent by his letter dated 27.09.1994, directed the petitioner to remit the said amount towards penalty for the loss of spirit.

4.13. The petitioner made a representation that the amount demanded was based on erroneous working and incorrect application of G.O.Ms.No.762, dated 29.06.1990. The contention of the petitioner is that the amount demanded by the respondents is not based on proper working sheet.

4.14. The third respondent replied back to the petitioner on 07.10.1994, demanding to remit the amount without any reference to the working sheet. Hence, the petitioner made a representation to the Government through letter dated 15.11.1994, requesting to furnish the particulars from the working sheet for such sum and to give the petitioner an opportunity to contest the claim made by the Department, and also requesting the first respondent to keep the demand of payment in abeyance till an opportunity is given to the petitioner and the details are furnished.

4.15. The third respondent has acknowledged the receipt of the representation, but again demanded the petitioner to remit the amount, by his letter dated 17.11.1994 and threatened to take penal action. Hence, the petitioner has approached this Court for issuance of a writ of declaration to declare the G.O.Ms.No.762, dated 29.06.1990, as void and unconstitutional and that the impugned letter is to be quashed.

4.16. The main grounds on which the petitioner is attacking the G.O. are :

- (1)the amendment of the Rule 15 A (3) by G.O.Ms.No.762 dated 29.06.1990, giving retrospective effect from 01.02.1988 is unconstitutional
- (2)the penal clause cannot be introduced in the statute with retrospective effect and it will offend Article 20 of the Constitution of India

(3)the penal law can only be prospective and cannot be retrospective, as the citizen should know as to what he should do and what he should not do to attract the penal law. Hence a prior notice to the citizen is mandatory

(4)the Government Order is vague and it is impossible to implement in the process of distillation and re-distillation, as there cannot be any distinction between the rectified spirit and impure spirit

(5)the impugned order has not taken into consideration the very process of re-distillation of impure spirit either by itself or by mixing with the rectified spirit and it is intended for extracting maximum amount of ENA out of the rectified spirit and as such no distinction can be made in the distillation process

(6)the Government is getting more revenue by way of excise duty, vend fees on IMFS, by extracting more quantity of ENA, either by mixing it with rectified spirit or by itself and it is more beneficial to the revenue rather than imposing penalty on the alleged excess loss

(7)the demand made by the Government is belated, as the demand has been made in 1994 for the alleged loss that occurred in the years 1988 and 1989

(8)in the distillation process, the impure spirit is unavoidable and it has to be recycled and re-purified either by itself or by mixing it with the rectified spirit to extract as much ENA as possible and the said fact has not been considered by the Government and that the Government has not given any opportunity to the petitioner to make itself to represent their case.

(9)The other strong ground raised by the petitioner is that the respondents did not furnish the details that how they have worked out for Rs.17.96 lakhs and made demand. COUNTER :

5. Additional Secretary to Government, Prohibition & Excise Department, filed a counter on behalf of the respondents, wherein it is stated that the petitioner was granted licence in Form No.2 under IMFS Rules to compound, blend, mature and bottle Indian Made Foreign Spirits. The raw material required for the manufacture of Indian Made Foreign Spirits is spirit, either rectified spirit or extra neutral alcohol, which is a purified form of spirit. It is also stated that to maintain the quality, the petitioner mostly use extra neutral alcohol and as such, the petitioner used to purchase the same from other distilleries for use in the manufacture of their IMFS products in their manufacturing unit and subsequently, they applied for permission for setting up their own spirit purification plant. Accordingly, permission is granted. One of the conditions is that gauging the stock of spirit issued for purification and the spirit purified shall be made by the Manufactory Officer every day and the result recorded in a register duly attested by the officer in the presence of the licensee or his authorised representative, on which the respondents heavily relies.

5.1. It is further stated that the petitioner set up the spirit purification plant in their premises and started trial production of extra neutral alcohol from August,1987 and regular production from October,1987. In this purification plant, rectified spirit is purified after removal of impurities contained in it such as fusel oil, acetic acid, aldehyde etc., and extra neutral alcohol is obtained after such purification. Further, there is no provision in IMFS Manufacturing Rules,1981, for regulating the purification of spirit, as no purification plant was set up by anyone in the State. However, after setting up of the purification plant, the necessity to regulate the functioning of such plants had arisen. Therefore, G.O.Ms.No.642 was issued and a new rule 15-A introduced.

5.2. It is contended that the process of purification of rectified spirit involves vapourisation and condensation and there are chances for loss of spirit. Therefore, a provision was made in the above rules, providing a reasonable allowance of 2% for loss of rectified spirit in the purification process. It is stated that the writ petitioner purified the rectified spirit alone in the initial stage but subsequently requested for permission to redestill the impure spirit also, which is obtained during the process of purification of rectified spirit. Accordingly, permission is granted to redestill the spirit, subject to the condition that no further wastage will be allowed for reprocessing of impure spirit into extra neutral alcohol. Thereafter, on 08.01.1988, the writ petitioner represented that

impure spirit after its repeated purification reached a stage where it alone could not be further purified and purification of this impure spirit could be possible only if it is mixed with fresh batch of rectified spirit. Therefore, they requested for permission to mix impure spirit with next batch of rectified spirit for further purification. They also gave an undertaking that they would not claim any allowance for the loss of spirit during further reprocessing of impure spirit thus mixed with next batch of rectified spirit. The loss of spirit during the initial stages i.e., when the regular purification process was started in October 1987 was around 5% which was more than the prescribed allowance of 2%. Therefore, it was considered by the authorities and time was given till 31.01.1988, so as to enable the improvement in efficiency of the spirit purification plant by that time and refixation of the admissible wastage might be done, if necessary, when the plant runs to its full capacity.

5.3. The contention of the respondents is that consequent to improvement in the efficiency of the spirit purification plant, the loss of spirit purification stabilizes around 3% . Therefore, it was proposed that the admissible wastage of spirit might be refixed at 3% for the entire process of distillation of rectified spirit, redistillation of impure spirit and handling loss and that the rate of penalty for the loss of spirit in excess of the above limit might be fixed at Rs.16/- per proof litre and based on this, the impugned G.O.Ms.No.762 was issued for inserting a new sub-rule (3) in rule 15 A in lieu of the then existing sub rule (3) with effect from 01.02.1988.

5.4. The further contention of the respondents is that the amended rule provides that no allowance shall be given for further loss in the reprocess of purification of impure spirit by redistillation either independently or after mixing it with the next batch of rectified spirit. It is also contended that though there was loss of rectified spirit in excess of 2% allowance for the period from the date of commissioning of the spirit purification plant up to 31.01.1988 and there was loss of rectified spirit, impure spirit and impure spirit mixed with rectified spirit in excess of the allowance of 3% during the period from 01.02.1988 onwards, the petitioner has not remitted the penalty for such excess loss of rectified spirit and therefore, the respondents have no other way except to issue the demand for collection of Rs.17.96 lakhs, being the penalty for excess loss of rectified spirit during the process of purification i.e., during the period from 01.02.1988 to 30.11.1989.

5.5. The forceful contention of the respondents is that in order to assess the daily output, the distillation column need not be emptied every day. There are three distillation columns in the purification plant and each purification column has an overhead tank for storing rectified spirit and feeding the same into the purification columns. The rectified spirit or impure spirit remaining in the overhead tanks is measured daily at 09.00 a.m. and the quantities of neutral alcohol and impure spirit collected during the previous day are also measured. After this process, the quantity of rectified spirit or impure spirit required for purification is allowed to be pumped into the overhead tanks and from the overhead tanks, rectified spirit is charged into the purification columns for purification in the next 24 hours i.e., from 09.00 a.m. of that day till 09.00 a.m. of the next day.

5.6. Thus, the contention of the respondents is that at 09.00 a.m. of the next day, the quantity of spirit remaining in the overhead tank is measured and the quantity actually distilled during the period of 24 hours is calculated. The basis for calculation is the quantity of spirit remaining in the overhead tanks at 09.00 a.m. for a particular day and the quantity of rectified spirit allowed to be pumped into overhead tanks for purification during the period of 24 hours commencing from 09.00 a.m. of that day and after totalling both, the quantity of spirit remaining in the overhead tanks at 09.00 a.m. of the next day is deleted and thereby the quantity of extra neutral alcohol and impure spirit collected and loss of spirit if any. The above method is being followed to find out on each day the quantities of extra neutral alcohol and impure spirit collected and loss of spirit if any and it is a fool-proof system and as such there is no need to empty the purification columns everyday to find out the above mentioned data. This method is strictly in accordance with the provisions contained in

Rule 15 A (3) of the Tamil Nadu Indian Made Foreign Spirits (Manufacture) Rules, 1981.

5.7. The respondents contend that the penalty amount of Rs.17.96 lakhs is levied for the excess loss of spirit during the process of purification of rectified spirit, impure spirit and impure spirit mixed with the next batch of rectified spirit, by applying the above method. While so, the writ petitioner has worked out the penalty as Rs.5,08,950/- on the basis of the quantity of rectified spirit issued every month as one batch and without taking into consideration of the wastage that has occurred when impure spirit is redistilled separately or after mixing with the next batch of rectified spirit, which is not in conformity with the provisions of the Rules.

5.8. With regard to the furnishing of the working sheets, the case of the respondents is that the statements were prepared daily, showing all the details, such as the quantities of rectified spirit, impure spirit, mixed with the next batch of rectified spirit taken up for distillation/re-distillation and also the quantities of extra neutral alcohol and impure spirit obtained after such distillation/re-distillation and the copies of the statements have been given to the writ petitioner then and there from 01.02.1988 onwards and after verifying the above statements, which are signed by the third respondent as well as the authorised representative of the writ petitioner, the amount is worked out. Therefore, there is no necessity for furnishing another working sheet to the petitioner for imposing the penalty of Rs.17.96 lakhs. Thus, the respondents contend that they need not give second working sheet, admitting that they did not give any working sheet, while demanding the penalty of Rs.17.96 lakhs.

5.9. With regard to the violation of constitutional provisions, the respondents stated that the demand for payment of penalty is not contrary to law but in total conformity with the provisions of TNIMFS Rules, 1987. Since the amendment through the impugned G.O. gives retrospective, the same is in consonance with the law.

5.10. In para 9, it is admitted that though the process of distillation of rectified spirit and redistillation of impure spirit is same, these two kinds of spirit can be easily identified by subjecting them to chemical analysis, as the rectified spirit which is obtained from molasses by way of distillation will contain lesser concentration of impurities, whereas in impure spirit, the concentration of impurities would be more. It is stated that rectified spirit can be straightaway blended for producing IMFS products whereas impure spirit will not be suitable for blending, as the resultant IMFS products would cause nausea, vomiting, headache, hangover etc., for the reason that the resultant IMFS products would contain more concentration of impurities, such as fusel oil, acetic acid, aldehyde etc.

5.11. Further, in para 10, the respondents admit that the processing of impure spirit either separately or mixed with the next batch of rectified spirit, is intended to extract maximum amount of extra neutral alcohol, which in turn go into production of more IMFS products, resulting in more revenue to the Government. But, it is stated that as the cost of impure spirit would be lesser compared to that of rectified spirit, there is every possibility for its diversion for illicit manufacture of liquor, which in turn would result in loss of revenue to the Government and the health of the consumers also will be affected by impurities contained in such spirit.

5.12. Therefore, the contention of the Government is that though the Government is likely to get more revenue and there is a possibility for diversion for illicit manufacture, the G.O. is not against to the public spirit. It is stated that the allowance of 3% has been given for the loss in the entire process of distillation of rectified spirit and re-distillation of impure spirit and handling loss and since impure spirit is redistilled, there is no justification for giving another allowance for loss when it is again purified. It is also stated that in the initial stages, the loss of spirit was around 5%, which

was more than the prescribed allowance. Hence, a notice was issued to the writ petitioner to remit the penalty amount for the loss of spirit occurred during the purification period from 05.10.1987 to 11.11.1987 and release of further quantity of rectified spirit for purification was also deferred and the writ petitioner has represented that the above penalty is on high side and requested for reduction and they remitted a fixed deposit of Rs.50,000/- in favour of the Commissioner of Prohibition and Excise and furnished an indemnity bond to pay the penalty amount, in the event of their request being negatived and taking all into consideration, time was given up to 31.01.1988 in order to improve the efficiency of the spirit purification plant and the refixation of admissible wastage might be done and after taking into account the fact that the loss of spirit has stabilised subsequently to 3%, rules were amended for making the provisions therein fixing the allowance for loss of spirit during purification as 3% and also for levy of penalty at Rs.16/- for proof litre.

5.13. It is stated that the petitioner having agreed to pay the penalty, now, cannot make a demand that imposing of penalty is illegal, and there are no merits in the writ petitions.

6. A reply affidavit has been filed by the petitioner, stating that they have assured that no process wastage would be claimed on the quantity of impure spirit thus mixed for purification, but they have not given any undertaking that they would not claim any allowance for the loss of spirit during further re-processing of impure spirit mixed with the next batch of rectified spirit. Therefore, it is stated that the undertaking was for the portion of the impure spirit only and not for the rectified spirit mixed with impure spirit. It is further stated that as per rules, the respondents are bound to allow the permitted percentage of loss for the rectified spirit mixed with the impure spirit and even as per the amended rule, no further allowance shall be given for further loss in purification of impure spirit by re-distillation independently or by after mixing with the next batch of rectified spirit and the petitioner has not claimed any further allowance for the quantity of impure spirit distilled and the petitioner has only claimed wastage allowed under the rules for the rectified spirit mixed with impure spirit.

6.1. Thus, the forceful contention of the petitioner is that the loss sustained for the rectified spirit portion and the loss sustained for impure spirit is not correct and is against to the rules. It is further stated that arriving at the figure of Rs.17.96 lakhs ignoring the larger quantity of rectified spirit with smaller portion of impure spirit is illegal and hence, the calculation through an unscientific method is erroneous.

6.2. The main contention of the petitioner is that the respondents have not taken into account the allowable wastage on rectified spirit and if the allowable wastage on rectified spirit is taken into account, the penalty will not be Rs.17.96 lakhs and it will be about Rs.5.08 lakhs and also the petitioner has not been given any opportunity in this direction.

7. The contention of the respondents is that during the continuous running of the plant from 09.00 a.m. to next day 09.00 a.m., if there is any problem that arises due to mechanical and electrical failure or water pipe line damage which will lead to no water to condenser which in turn will lead to venting of the plant and will result in reduction in production of final product or reduction in strength and quality of the product for which the petitioner has to feed more to the plant or with less tapping of production, which will be reflected in more production or less production on the next day, thereby the petitioner will incur more wastage on the disturbed day and more production on the following day, the calculation of wastage on day-to-day system is improper.

8. The contention of the petitioner is that daily reckoning of the issues can be approximately assessed once in three months, which will be more precise, as the fluctuations on any particular day

will be ironed out during longer period and assessment on daily basis cannot be fool-proof system, as it has not taken care with regard to fluctuations that may arise in the day's working. The petitioner further contends that they have worked out the wastage on monthly basis, as there is no specific definition for 'Batch' and arrived at the penalty of Rs.5.08 lakhs and the wastage has been calculated on the rectified spirit distillation exceeding 3% loss and in the case of rectified spirit and impure spirit mixed distillation, the wastage is claimed on the rectified spirit portion alone and therefore, the demand of penalty is illegal.

9. Heard the arguments of both sides.

10. Mr.M.Ravindran, learned Senior Counsel for the petitioners, forcefully contended that G.O.Ms.No.762/Home, Prohibition & Excise (III) Department, dated 29.06.1990, is unconstitutional and liable to be quashed. While highlighting the same, it is stated that amendment of Rule 15 A (3) through the said G.O. by giving retrospective effect from 01.02.1988 is illegal. It is further contended that a penal clause cannot be introduced in the statute with retrospective effect and it will offend Article 20 of the Constitution of India. It is stated that the above G.O., imposing penalty for excess loss that occurred from 1st February, 1988, till the issue of G.O., by imposing penalty for excess loss is clearly opposed to the provisions of the Constitution of India, more particularly Article 20.

10.01. The enlightening argument of Mr.Ravindran is that a penal law can only be prospective and cannot be retrospective, since the citizen is not put up on notice as to what he could do and what he could not do during that period, as there is no provision imposing any penalty for doing or not doing anything. It is also contended that the order of the Government is vague and it is impossible to implement in the process of distillation and re-distillation, because there is no distinction between rectified spirit and impure spirit at that stage.

10.02. Mr.Ravindran also contended that the Government has not taken into consideration the very process of re-distillation of impure spirit either by itself or by mixing it with rectified spirit and in fact ignored the fact that it is intended for extracting maximum amount of ENA out of the rectified spirit and as such no distinction can be made in the distillation process. He further contended that through the impugned order the Government is losing heavy revenue and it is by way of excise duty, vend fee and IMFS and it is not in the interest of the revenue of the State. It is stated that extraction of more quantity of ENA by re-distillation process either by mixing it with rectified spirit or by itself is more beneficial to the revenue of the State rather than imposing penalty on the alleged excess loss.

10.03. In fact, this point is almost conceded by the State and they admit that there is a loss of revenue to the State through the impugned G.O. This fact is also admitted in the counter and during the course of arguments.

10.04. Mr.Ravindran also focussed the attention that in the distillation process, the impure spirit is unavoidable and it is to be recycled and re-purified either by itself or by mixing it with the rectified spirit to extract as much ENA as possible and when this is being done, it is not legal and proper to impose any penalty.

10.05. The other submission of the petitioner is that the demand is made with delay and the delayed demand is liable to be rejected. According to him, the demand has been made in the year 1994 for the alleged loss that occurred in the year 1988-89 and the penalty is imposed in the year 1994 for the act committed in the year 1988-89 and that itself is sufficient to reject the demand made through the G.O.

11.00. Mr.R.Viduthalai, learned Advocate General, appearing on behalf of the State, contended that the power of the Government cannot be questioned by the petitioner and while considering all the issues, the G.O.in question has been issued and it is to streamline the entire system.

11.01. It is contended that in the purification plant of the petitioner, rectified spirit is purified after removal of the impurities and extra neutral alcohol is obtained after such purification and as there is no provision regulating the purification of spirit prior to setting up of the plant; hence, in order to regulate the functioning of such plants, the G.O.has been issued and a new Rule 15 A (3) introduced and it is not illegal and unconstitutional. The provision was made in the rules, providing a reasonable allowance of 2% for loss of rectified spirit in the purification process and the petitioner was purifying the rectified spirit alone in the initial stage, but subsequently, requested for permission to re-distill the impure spirit, which is obtained during the process of purification and the petitioner has given an undertaking that they would not claim any allowance for the loss of spirit during the further reprocessing of impure spirit, which was mixed with the batch of rectified spirit and as it was noticed that the loss of spirit during the initial stage i.e., when the regular purification process was started in October 1987, was around 5%, which was more than the prescribed allowance of 3%, the authorities considered and directed to improve the efficiency and accordingly the efficiency was increased and the loss of spirit purification stabilized around 3%. Therefore, it was proposed that the admissible wastage of spirit is re-fixed at 3% for the entire process and there is no illegality.

11.02. The forceful contention of the learned Advocate General is that the petitioner has not remitted any amount for such excess loss of rectified spirit and though there was loss of rectified spirit in excess of 2% allowance from the date of commissioning of the spirit purification plant up to 31.01.1988 and impure spirit is mixed with rectified spirit in excess of the allowance of 3% during the period from 01.02.1988 onwards, demand is made for collection of Rs.17.96 lakhs as penalty.

12.00 : POINT : 12.01. The point for determination is, whether the impugned G.O. is illegal ?

12.02. The admitted fact is that IMFS Rules 1981 do not contain anything about the loss in the manufacturing process. However, it contains a provision that no allowance for any loss in transit from distillery to the blending unit shall be allowed.

12.03. The contention of the State is, since no purification plant was set up by anyone in the State of Tamil Nadu by the date of framing of the Rules, there is no provision in IMFS Rules for regulating the purification of the spirit.

12.04. The above argument is convincing and it is acceptable. But, the crucial fact to be noted is, subsequent to the Rules,1981, G.O.Ms.No.642, Prohibition and Excise (III) Department, was issued on 29.05.1986 and the Rules were amended and under Rule 15 A (3), an allowance of 2% was allowed for loss in the process of purification or standardisation of spirit by distillation. This is an admitted fact. Under this Rule, there is no distinction between distillation of rectified spirit and re-distillation of impure spirit. The petitioner, by following the above rule and by installing the re-distillation unit in or from October,1987, for purification of rectified spirit and impure spirit, produced extra neutral alcohol for its use in IMFS products during its business. Thus, an impression is given by the State to the petitioner that through G.O.Ms.No.642, dated 29.05.1986, an allowance of 2% shall be allowed for the loss in process of purification or standardisation of spirit by distillation and that there is no distinction between rectified spirit and redistillation of impure spirit. When this process was going on, suddenly, the State issued an amendment through the impugned G.O.Ms.No.762 on 29.06.1990 and a new sub-rule has been introduced that an allowance of not more than 3% per batch shall be allowed. Even the validity of G.O. can be examined, because this is based on the loss in the entire process of distillation of rectified spirit, redistillation of impure spirit and handling losses. But, the most objectionable clause in this amended G.O.No.762, dated

29.06.1990, is levying of penalty of Rs.16/- per proof litre on such excess loss and no allowance shall be given for further loss in the process of purification of impure spirit by redistillation or mixing it with the next batch of rectified spirit and more dangerous approach of the State is to implement this with retrospective effect. It is undoubtedly unconstitutional and illegal.

12.05. When the State intends to have its own policy, nobody can question it, but while amending Rule 15 A by new sub-rule (3), the State can direct for allowance but after hearing the affected party and in any case the demand of penalty should not be with retrospective effect. The G.O.says that the amendment shall be deemed to have come into force on 1st February,1988, which is highly objectionable and not permissible under the law of the land.

12.06. It is rightly contended by Mr.Ravindran, learned Senior Counsel for the petitioner, that giving retrospective effect to the new sub-rule 15 A (3) is unconstitutional.

12.07. Can a person be convicted for an act which is not an offence by the date of committing the act ? Certainly not. Penalty can be imposed if there is a violation by the date of act. In this case, the State imposes penalty when there is no violation by its date.

12.08. The forceful contention of the petitioner is that purely on vagueness the demand is made and there is no record before the respondents to arrive at a particular figure and they have failed to note that their own official is very much present in the factory premises, maintaining the registers certifying the activities, and without having any record or evidence, the demand is made, which is liable to be struck down.

12.09. Learned Senior Counsel relied on a judgment in Co-operative Company v. State of U.P. //2003 (12) Supreme Court Cases 231//, in which it was held as follows :

"4. Having examined the very order of the Deputy Commissioner as well as the report of the Excise Inspector who was in-charge of the appellant's manufacturing unit, it is difficult for us to come to the conclusion that the levy in question was being made only on the wastage of the country liquor after the rectified spirit was being made fit for human consumption. In the aforesaid premises, we set aside the impugned demand raised by the Deputy Commissioner as well as the judgment of the Division Bench of the Allahabad High Court and remit the matter to the competent Excise Authorities to decide the question of the levy of excise duty bearing in mind the judgment of this Court in Modi Distillery case (2002 (4) SCC 547) as well as the recent judgment of this Court in Civil Appeal No.1999 of 1997 disposed of on 12-2-2002 and also the relevant portions of the U.P.Excise Manual. Since the duty has to be levied on determination of certain facts, it would not be possible either for this Court or the High Court to get into the same. The appeal is allowed to the aforesaid extent. Be it stated that the amount already paid pursuant to the interim order of this Court would be taken into account after the ultimate order is passed by the Excise Authorities."

12.10. In Deccan Sugar & Abkari Co.Ltd. v. Commissioner of Excise //1998 (3) Supreme Court Cases 272// the Supreme Court held as follows :

"4. It is to be kept in view that the aforesaid decision rendered in Bihar Distillery case (1997 (2) SCC 727) by an Bench of two learned Judges of this Court was strictly concerned with the question whether the State could cancel licences given to a distillery manufacturing rectified spirit on the grounds as alleged to be relevant for such cancellation. Therefore, strictly speaking there was no occasion for this Court in Bihar Distillery case to consider the wider question whether any excise duty can be levied by the State on the manufactured rectified spirit which may ultimately be used for production of potable liquor. Even that apart the aforesaid observations made in Bihar Distillery case by the Division Bench of this Court prima facie run counter to the scheme of legislative competence as examined by the Constitution Bench of this Court as well as in the three-Judge Bench

decision of this Court in Modi Distillery."

12.11. Almost an identical issue has arisen before the Hon'ble Supreme Court and a Larger Bench answered this point in // Deccan Sugar & Abkari Co.Ltd. v. Commissioner of Excise // 2004 (1) Supreme Court Cases 243 // and observed as follows :

"1.In the instant case, the demand from the appellant as per the order of the Excise Commissioner was as follows :

"Hence a demand notice is hereby issued to you to pay excise duty for an amount of Rs.1,59,15,376.40 for the loss of rectified spirit amounting to 6,18,842 litres (10,33,466 PLs) calculated at the rate of Rs.15.40 PL. You may note that this does not in any way prevent the Commissioner from initiating any action to cancel your licence."

2. It is settled by the decision of this Court in Synthetics and Chemicals Ltd. v. State of U.P. (1990 (1) SCC 109) that the State Legislature has no jurisdiction to levy any excise duty on rectified spirit. The State can levy excise duty only on potable liquor fit for human consumption and as rectified spirit does not fall under that category the State Legislature cannot impose any excise duty. The decision in Synthetics and Chemicals Ltd. v. State of U.P. has been followed in the State of U.P. v. Modi Distillery (1995 (5) SCC 753) where certain wastage of ethyl alcohol was sought to be taxed. This Court following the decision in Synthetics and Chemicals Ltd., came to the conclusion that this cannot be done.

3. In the present case also, the aforequoted passage from the Excise Commissioner's order indicates that the duty is sought to be levied on the loss of rectified spirit amounting to 6,18,842 litres. We have already observed that no duty can be levied by the State on the rectified spirit and, therefore, the impugned order of the Commissioner of Excise is set aside. The appeal is allowed accordingly."

12.12. In Govt. of Haryana v. Haryana Brewery Ltd. // 2002 (4) Supreme Court Cases 547 //, the Supreme Court observed as follows :

"15. The allowance is contained in the proviso to Section 32 read with Rule 35. If the entries in the brewing book of the licensee or in the survey book in Form B-6 of the Inspector are not to be taken into consideration, then the question of giving an allowance of 7 per cent contemplated by Rule 35 would also not arise.

16. It appears to us that resorting to Rule 35 and calculating the quantity of beer which is manufacture and is fit for human consumption cannot be said to be invalid or impermissible. As we have already indicated, the said Rule only helps in determining what should be the quantity of beer actually manufactured, after all the processes have been undertaken.

17. In the instant case, it is contended by the learned counsel for the respondent that the figures which are given and entered in the brewing book pertain to the worts which means the liquor obtained by the exhaustion of malt or grain but to which no yeast had been added and, therefore, had not become alcoholic liquor fit for human consumption. This figure, it was submitted, should not have been taken into account. If this be so, then the Excise Authorities had to calculate and determine the exact quantity of beer manufactured by the respondent and then levy excise duty thereon. On the figures so determined, Rule 35 being inapplicable as contended by the respondent, the question of giving any allowance of 7 per cent or wastage would not arise. What follows from the above is that the Excise Authorities can levy excise duty only on the beer after it has been manufactured; the levy has to be on the quantity manufactured. How this quantity is to be arrived at has to be determined according to Section 32 read with Rule 35."

12.13. Learned Senior Counsel for the petitioner has also cited the decision in State of U.P. v. Modi

Distillery // 1995 (5) Supreme Court Cases 753 // and the Apex Court was pleased to observe at para 10 as follows :

"10. What the State seeks to levy excise duty upon in the Group 'B' cases is the wastage of liquor after distillation, but before dilution; and, in the Group 'D' cases, the pipeline loss of liquor during the process of manufacture, before dilution. It is clear, therefore, that what the State seeks to levy excise duty upon is not alcoholic liquor for human consumption but the raw material or input still in the process of being rendered fit for consumption by human beings. The State is not empowered to levy excise duty on the raw material or input that is in the process of being made into alcoholic liquor for human consumption."

12.14. The leading case from the Constitution Bench of the Apex Court on this aspect is *Synthetics and Chemicals Ltd. v. State of U.P.* // 1990 (1) Supreme Court Cases 109 //.

In the above case, the main question came up for consideration was, whether the vend fee in respect of industrial alcohol under different legislations and rules in different States is valid ? and the said question is answered as a common question of law, dealing with the factual situations on the basis of the provisions of various Acts, as follows :

"56....we must recognise the exercise of sovereign power which gives the States sufficient authority to enact any law subject to the limitations of the Constitution to discharge its functions. Hence, the Indian Constitution as a sovereign State has power to legislate on all branches except to the limitation as to the division of powers between the Centre and the States and also subject to the fundamental rights guaranteed under the Constitution. The Indian State, between the Centre and the States, has sovereign power. The sovereign power is plenary and inherent in every sovereign State to do all things which promote the health, peace, morals, education and good order of the people. Sovereignty is difficult to define. This power of sovereignty is, however, subject to constitutional limitations. This power, according to some constitutional authorities, is to the public what necessity is to the individual. Right to tax or levy imposts must be in accordance with the provisions of the Constitution."

"63.... the States have the power to regulate the use of alcohol and that power must include power to make provisions to prevent and/or check industrial alcohol being used as intoxicating or drinkable alcohol. The question is whether in the garb of regulations a legislation which is in pith and substance, as we look upon the instant legislation, fee or levy which has no connection with the cost or expenses administering the regulation, can be imposed purely as regulatory measure. Judged by the pith and substance of the impugned legislation, we are definitely of the opinion that these levies cannot be treated as part of regulatory measures...."

"67. It is well to remember that the meaning of the expressions used in the Constitution must be found from the language used. We should interpret the words of the Constitution on the same principle of interpretation as one applies to an ordinary law but these very principles of interpretation compel one to take into account the nature and scope of the Act which requires interpretation. A Constitution is the mechanism under which laws are to be made and not merely an Act which declares what the law is to be. It is also well settled that a Constitution must not be construed in any narrow or pedantic sense and that construction which is most beneficial to the widest possible amplitude of its power, must be adopted. An exclusionary clause in any of the entries should be strictly and, therefore, narrowly construed. No entry should, however, be so read as not (sic) to rob it of entire content. A broad and liberal spirit should, therefore, inspire those whose duty it is to interpret the Constitution, and the courts are not free to stretch or to prevent the language of an enactment in the interest of any legal or constitutional theory. Constitutional adjudication is not

strengthened by such an attempt but it must seek to declare the law but it must not try to give meaning on the theory of what the law should be, but it must so look upon a Constitution that it is a living and organic thing and must adapt itself to the changing situations and pattern in which it has to be interpreted. It has also to be borne in mind that where division of powers and jurisdiction in a federal Constitution is the scheme, it is desirable to read the Constitution in harmonious way. It is also necessary that in deciding whether any particular enactment is within the purview of one legislature or the other, it is the pith and substance of the legislation in question that has to be looked into. It is well settled that the various entries in the three lists of the Indian Constitution are not powers but fields of legislation. The power to legislate is given by Article 246 of the Constitution. The three lists of the Seventh Schedule to the Constitution are legislative heads or fields of legislation. These demarcate the area over which the appropriate legislatures can operate. It is well settled that widest amplitude should be given to the language of the entries in three Lists but some of these entries in different lists or in the same list may override and sometimes may appear to be in direct conflict with each other, then and then only comes the duty of the court to find the true intent and purpose and to examine the particular legislation in question. Each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be comprehended in it. In interpreting an entry, it would not be reasonable to import any limitation by comparing or contrasting that entry with any other in the same list. It has to be interpreted as the Constitution must be interpreted as an organic document in the light of the experience gathered. In the constitutional scheme of division of powers under the legislative lists, there are separate entries pertaining to taxation and other laws...."

"73....It is constitutionally impermissible for any State Government to collect any amount which is not strictly of the nature of a fee in the guise of a fee. If in the guise of a fee the legislation imposes a tax it is for the court on scrutiny of the scheme of the levy to determine its real character. If on a true analysis of the provisions levying the amount, the court comes to the conclusion that it is, in fact, in the nature of a tax and not a fee, its validity can be justified only by bringing it under any one of the entries in List II of the Seventh Schedule to the Constitution under which the State can levy tax."

12.15. All the above judgments strongly advance the case of the petitioner and question the power of the State.

13. At this stage, it is necessary to refer to Article 20 of the Constitution, on which the petitioner heavily relies, by advancing the arguments that the penal clause should not have a retrospective effect. A plain reading of Article 20 clarifies that a person shall not be convicted of any offence except for violation of a law in force at the time of commission of offence and charged with an offence nor be subjected to "penalty greater than what it might have been inflicted under law in force at the time of commission of offence."

14. In the instant case, the new rule 15 A (3) has come into existence with effect from 29.06.1990 and in the considered opinion of this Court, it should be effective from the date of the G.O. and not from 1st February, 1988, as mentioned in the G.O. Further, the issuance of G.O.Ms.No.762 is itself questionable and it is issued without hearing the affected party. Thereafter, the impugned demand notices are issued without any basis, without worksheet and without an iota of evidence.

15. In the above circumstances, the Writ Petitions are allowed, holding that G.O.Ms.No.762/Home, Prohibition and Excise (III) Department, dated 29.06.1990, giving retrospective effect from 01.02.1988, is unconstitutional and all the subsequent demands are illegal. No costs.

Index : Yes 16-12-2006

Internet : Yes

dixit

To

1.The Government of Tamil Nadu,  
represented by its Secretary,  
Home, Prohibition & Excise Department,  
Fort.St.George,  
Madras □ 9.

2.The Commissioner of Prohibition and Excise,  
Chepauk,  
Madras-5.

M.E.N.PATRUDU,J.

W.P.Nos.24 & 52 OF 1995 &  
2324 & 2325 OF 1997

16-12-2006